

(2016) 06 KAR CK 0078

In the Karnataka High Court

Case No : Criminal Petition No. 3468 of 2016.

**Sridhar Punachithaya K. - Petitioner @HASH The Intelligence Officer,
Directorate of Revenue Intelligence, Bangalore Zonal Unit, Bangalore**

Date of Decision : 28-06-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 37, Section 8
Narcotic Drugs and Psychotropic Substances Rules, 1985 — Rule 64

Citation : (2016) 5 KantLJ 473

Hon'ble Judges : K.N. Phaneendra, J.

Bench : Single Bench

Advocate : Sri Hashmath Pasha, Advocate, for the Petitioner; Sri Jeevan J. Neeralgi, Senior Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

K.N. Phaneendra, J. - The petitioner is A2 in CIS Cr. No. 254 of 2016 on the file of the XXXIII Additional City Civil and Sessions Judge and Special Judge (NDPS), Bengaluru, registered in F. No. DRI/BZU/S-IV/INT-09/2016 in a complaint lodged by the Investigating Officer, Directorate of Revenue Intelligence, Bangalore Zonal Unit, Banaswadi, Bangalore.

2. The brief factual aspects that emanate from, the records are that:

Upon receipt of credible information by the Senior Intelligence Officer of Directorate of Revenue Intelligence (hereinafter referred to as "DRI" for short), Bengaluru, on 6-4-2016 at about 8.00 a.m., visited the Company by name M/s. RACS Pharmachem (India) Private Limited, situated at Plot No. 11, IP-13, Part-2, KIADB Industrial Area, 1st Phase, Kudumalakunte Village, Gauribidanur, Chikkaballapur District, Karnataka, and caused search in the Research and Development Department and found half-white powder purported to be "Alprazolam" a Psychotropic Substance to an extent of 5.8 kgs. Further, it is alleged that from the car of A-I Chintalapati H. Jagannadha Raju and from his residence, similar substances were found and the same were seized under

mahazar. These aspects are concerned, it refers to A1 who is not before this Court.

3. It is also alleged that in the similar Pharmaceutical Intermediate Manufacturing Company by name M/s. Hexagon Bio Pharma Private Limited, situated at KIADB Industrial Area, Doddaballapura was also raided and searched on the same day between 11.00 a.m. to 3.00 p.m., and in the said Research and Development Laboratory Unit, they found a black coloured plastic cover containing half-white coloured powder substance and on testing, it had answered positive for Ketamine which was weighed and found to be 13.800 kgs. and the same was seized after drawing 20 grams of 3 sets as samples under a mahazar. It is not in dispute that the petitioner is an M.Sc., Post-graduate in Chemistry. He had worked as a "Chemist" in many medicinal production factories including M/s. Smithcline Bechem Pharmaceuticals, M/s. Syngene and M/s. Biocon of Kiran Majumdar and he has got sufficient technical knowledge and in fact he wanted to establish his own company and Government has sanctioned land and loan to him to start a Pharmaceutical Intermediate products and with the help of other Directors, he has started M/s. Hexagon Bio-Pharma Private Limited, which indulged in manufacturing of medicines and also medicinal intermediate products. In this context, it is alleged that the article found in his Company which is shown to be "Ketamine Hydrochloride" which is kept for the purpose of delivering the same to another company which indulged in manufacturing medicines. It is further contended by the learned Counsel that the said Ketamine Hydrochloride is neither a drug nor a medicine which is prohibited under the Narcotic Drugs and Psychotropic Substances Act, 1985 nor it is a substance which is declared as a contraband article under the NDPS Act. The said Ketamine Hydrochloride is not covered under any of the schedules or rules. But it is only comes under Schedule X to the Drugs and Cosmetics Act, 1940 and when it is not covered under any of the Schedule to the Rules, it cannot be said that it comes under a Narcotic Drug or Psychotropic Substance.

4. The learned Counsel also contends that Section 8 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "NDPS" Act for short) exempts such persons who are dealing with such drug or substance which is not covered under any Schedule, Act or an Order under the NDPS Act, 1985 and Narcotic Drugs and Psychotropic Substances Rules, 1985. Therefore, when such being the case, Section 37 of the NDPS Act, it cannot be said that the accused is guilty of any of the offences under the NDPS Act.

5. Per contra, the learned Counsel for the respondent strenuously contends that the said Ketamine Hydrochloride, though does not refer to under any Schedule, but Ketamine is declared as an NDPS under the Act. Therefore, keeping the same in possession without any licence even for manufacturing any medicine is an offence under the NDPS Act. The petitioner has not produced any licence to possess such NDPS substance i.e., Ketamine Hydrochloride issued by the competent Drug Controller nor he has shown any explanation as to the same was

stored in his manufacturing unit for the purpose of manufacturing medicines. Therefore, it is contended that the provisions of Section 8 of the NDPS Act is not attracted and as such, the petitioner has committed the offence under the provisions of the NDPS Act. Therefore, at this stage, the Court cannot say that he is not guilty of any offence. Hence, he is not entitled for bail under Section 37 of the NDPS Act.

6. On careful perusal of the materials placed before this Court, there is no dispute that the petitioner has been running a company which is involved in producing intermediate products which in-turn will be supplied to A-1 i.e., M/s. RACS Pharma Chem (India) Private Limited, for the purpose of manufacturing medicines or for final process. The establishment of the Pharmaceutical intermediate upon job work by the petitioner is also not in dispute. It is mainly doing its business by supplying intermediate products by taking job work from different companies for the purpose of manufacturing various medicinal drugs. These intermediate products also medicinal products.

7. The learned Counsel for the petitioner mainly relied upon Rule 64 of the NDPS Rules, which reads as follows:

"64. Manufacture of psychotropic substances. -(1) No person shall manufacture any of the psychotropic substances except in accordance with the conditions of a licence granted under the Drugs and Cosmetics Rules, 1945 (hereinafter referred to as the "1945 rules") framed under the Drugs and Cosmetics Act, 1940 (23 of 1940), by an authority in-charge of Drugs Control in a State appointed by the State Government in this behalf:

Provided that a licence to manufacture a psychotropic substance specified in Schedule I shall be issued only for the purposes mentioned in Chapter VII-A:

Provided further that the authority in charge of the drug control in a State shall consult the Narcotics Commissioner before issuing a licence to manufacture a psychotropic substance specified in Schedule I."

The said section is subjected to amendment with effect from 23-3-2015. This section and provision says that a person is entitled to manufacture Psychotropic Substance specified in Schedule I, if he takes licence from the Competent Authority. That clearly indicates that if the Psychotropic Substance is not coming under Schedule I to the said provision, licence is also not prescribed in the said Rules and no whisper about mere possession of any such Article.

8. There is absolutely no dispute with regard to the fact that under Schedules I to III particularly Schedule I to Rule 64, the substance which is alleged to have been seized from the petitioner i.e., Ketamine Hydrochloride has not been inserted in Schedule I.

9. In this background, it is also necessary for this Court to look into Section 8 of the NDPS Act. It is also not in dispute that this Ketamine is included only in Schedule H of the NDPS Act (sic). Section 8 of the Act has to be looked into on

this touchstone, as to:

(1) Whether the drugs are used for any medicinal purposes?

(2) Whether they come within the purview of the regulatory provisions contained in 1985 Rules and Schedule therein?

10. Now, let me see what exactly Section 8 of the NDPS Act says. Section 8 provides for prohibition in respect of certain operations, stating:

"8. Prohibition of certain operations.

- No person shall. -

(a) cultivate any coca plant or gather any portion of coca plant; or

(b) cultivate the opium poppy or any cannabis plant; or

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation." The rest of the provision, in my opinion, is not necessary as it refers to Ganza.

11. On meaningful understanding of the above said Rules as well as Section 8 of NDPS Act, it makes it clear that the prohibition operates to produce manufacture, possess, sell or purchase, transport warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or transship any narcotic drug or psychotropic substance. The possession or manufacture becomes an offence. But exception to Section 8 of the NDPS Act says that if those Narcotic Drug or Psychotropic Substance is used for medicinal purpose or scientific purpose and if they are done in accordance with the NDPS Rules, Drugs and Cosmetics Act, 1940 and Rules thereunder, they are exempted from the NDPS Act. The second part of this section also indicates that Narcotic Drug or Psychotropic Substance are not covered under the provisions of the Act or the Rules or the orders there under, then also, the Act will not apply. The Act is not only covered under this provision but also Rules are covered in the said provision and therefore, if any drug or substance which are not covered either under the Act or under the Rules or under the Orders, then also the operation of Section 8 is not applicable. In this background, it is to be seen whether in this particular case, the said exception under Section 8 is applicable. The Hon'ble Apex Court in a recent decision in Union of India and Another v. Sanjeev V. Deshpande, (2014) 13 SCC 1 interpreting Section 8 as well as the relevant rules has held thus:

"Section 8(c) in no uncertain terms prohibits the DEALING IN any manner in any narcotic drug or psychotropic substance. The exception being that DEALING IN

any narcotic drug or psychotropic substance is permitted "in the manner and to the extent provided by the provisions of this Act or the Rules or Orders made thereunder". In other words DEALING IN narcotic drugs and psychotropic substances is permissible only when such DEALING is for medical purposes or scientific purposes. Further, the mere fact that the DEALING IN narcotic drugs and psychotropic substances is for a medical or scientific purpose does not by itself lift the embargo created under Section 8(c). Such a dealing must be in the manner and extent provided by the provisions of the NDPS Act, NDPS Rules or Orders made thereunder. Sections 9 and 10 enable the Central and the State Governments respectively to make rules permitting and regulating various aspects contemplated under Section 8(c) of the NDPS Act of DEALING IN narcotic drugs and psychotropic substances. The NDPS Act does not contemplate framing or rules for prohibiting the various activities of DEALING IN narcotic drugs and psychotropic substances. Such prohibition is already contained in Section 8(c) of the NDPS Act. It only contemplates of the framing of Rules for permitting and regulating any activity of DEALING IN narcotic drugs or psychotropic substances. Therefore, the conclusion reached by the various High Courts that prohibition contained under Section 8 is not attracted in respect to all those psychotropic substances which find a mention in the Schedule to the NDPS Act but not in Schedule I to the NDPS Rules is untenable.

State of Uttarachal v. Rajesh Kumar Gupta, (2007) 1 SCC 355 wrongly concluded that the prohibition contained in Rule 63 of the NDPS Rules is applicable only to those narcotic drugs and psychotropic substances which are mentioned in Schedule I to the Rules and not to the psychotropic substances enumerated in the Schedule to the NDPS Act. Rajesh Kumar Gupta's case unfortunately ignored the mandate of Section 8(c) which inter alia prohibits in absolute terms import into and export out of India of any narcotic drug and psychotropic substance. Rules framed under the Act cannot be understood to create rights and obligations contrary to those contained in the parent Act.

Rule 64 purports to prohibit various operations other than import into or export out of India in psychotropic substances specified in Schedule I for the obvious reason that import and export operations are already covered by Rule 53. Rule 65 authorises the manufacture of psychotropic substances other than those specified in Schedule I to the Rules subject to and in accordance with the conditions of a licence granted under the 1945 Rules. The rule also provides for various other incidental matters. Rule 65-A prohibits the sale, purchase, consumption or use of any psychotropic substances except in accordance with the 1945 Rules. Rule 66 prohibits any person from having in possession any psychotropic substance even for any of the purposes authorised under the 1945 Rules unless the person in possession of such a psychotropic substance is lawfully authorised to possess such substance for any of the purposes mentioned under the NDPS Rules. Persons who are authorised under the NDPS Rules, and the quantities of the material such persons are authorised to possess, are specified under Rule 66(2)."

The Hon?ble Apex Court has held that:

"Narcotic Drugs and Psychotropic Substances Act, 1985 Section 8(c) Prohibition of activities in Section 8(c) - Substances to which the prohibition is applicable - Effect of non-inclusion in Schedule to NDPS Rules - (a) Prohibited substances concerned not finding mention in Schedule to NDPS Rules but finding mention in Schedule to NDPS Act."

Mere fact that dealing in Narcotic Drugs and Psychotropic Substance for medicinal or scientific purpose does not by itself lift the embargo created under Section 8(c). Such a dealing must be in the manner and extent provided under the NDPS Act, NDPS Rules or Orders made thereunder. But the Rule like 53 or 64 of NDPS Rules cannot be the source of authority for prohibiting or dealing with the Narcotic Drugs or Psychotropic Substances.

12. The above said ruling abundantly makes it clear that even a drug which is covered under the Act, Schedule to the Act or to any orders or to any Rules for such NDPS Act and Rules are applicable. It makes it clear that Aether the said substance is either covered under the Act or under the Rules, then NDPS Act is attracted.

13. There is no dispute that Ketamine is covered under Schedule to the Act. But there is no specific substance for Ketamine Hydrochloride which is covered under the Act or under the Rules anywhere. Further added to that, there is no material for the present to show that the petitioner was manufacturing or he has kept those articles for the purpose of exporting the same or for selling the same. Admittedly, it is only the petitioner's Company, which is an intermediate unit, which only takes the orders, prepares the said Ketamine Hydrochloride, returns the same to the person who has given the order after completing its process. Therefore, during the course of evidence, it should be established beyond reasonable doubt that actually the petitioner was manufacturing Ketamine or he was having possession of the same for the purpose of selling or for the purpose of exporting the same.

14. The learned Counsel for the petitioner also brought to my notice that the Drugs and Cosmetics Rules contemplates taking of licence for the purpose of manufacturing or for the purpose of selling, possessing any drug or cosmetics, licence is only contemplated for the purpose of manufacturing and selling but not for mere processing of a drug or a psychotropic substance if it is used for the purpose of medicine or for research. He also brought to my notice that earlier this Ketamine which was kept in Schedule H to Drugs and Cosmetics Rules. Subsequently, it is transferred to Schedule X, which, only says that the licence is required for the purpose of manufacturing and for the purpose of selling or exporting the same and not for processing the same according to the learned Counsel, particularly Ketamine Hydrochloride itself is incorporated in this Schedule X.

15. Looking to the above said facts and circumstances of the case and the law

laid down by the Hon?ble Apex Court, on meticulous observation of the Act and Rules of the NDPS, in my opinion, doubt has been created by the petitioner whether actually NDPS Act is applicable to the present case or not as he has taken up this specific plea that he has only an intermediate unit who only processes Ketamine Hydrochloride for the supply of the same to the manufacturer of a drug or a medicine. Therefore, the manufacturer is the person who manufactures the medicines and sells the same. If he has licence for the same, the intermediate unit owner who only processes the Ketamine Hydrochloride, need not have any licence because he never manufactures and sells the same to anybody by way of medicine. These factors i.e., whether the petitioner requires any licence and whether the manufacture of a medicine has got any licence, whether ipso facto it will enure to the benefit of the petitioner are all the matters in fact are doubtful circumstances at present. When such strong doubt is created in the mind of the Court, it cannot be with all certainty said that the petitioner is guilty of the offence under the NDPS Act.

16. Therefore, giving such benefit, in my opinion, at this stage, particularly for grant of bail, the Court should exercise its judicious discretion keeping open all the above said factors to be proved by the prosecution during the course of full dressed trial. With these observations, the petition deserves to be allowed. Accordingly, I pass the following:

ORDER

The petition is allowed. The petitioner shall be released on bail in F. No. DRI/BZU/S-IV/INT-09/2016 on the file of the XXXIII Additional City Civil and Sessions Judge and Special Judge for NDPS Cases (CCH-33), Bengaluru, subject to the following conditions:

- (i) The petitioner shall execute his personal bond for a sum of Rs. 2,00,000/- (Rupees Two lakhs only) with two solvent sureties for the like-sum to the satisfaction of the XXXIII Additional City Civil and Sessions Judge and Special Judge for NDPS Cases (CCH-33), Bengaluru.
- (ii) The petitioner shall not indulge in hampering the investigation or tampering the prosecution witnesses.
- (iii) The petitioner shall appear before the Investigating Officer as and when required for the purpose of further investigation, interrogation etc.
- (iv) The petitioner shall assist for completion of the investigation.
- (v) The petitioner shall appear before the jurisdictional Court on all the future hearing dates unless exempted by the Court for valid reasons.